reasonable for a man to release a debt altogether, surely it is reasonable to release the securities for a debt, not itself released, as is done in covenants not to sue. And even if it be not reasonable, we cannot set up our reasons or the public reason for that of the contracting parties, and make a contract for them that is contrary to their plain intention, without violating the first principles of freedom and the very nature of contract relations.

We cannot read this contract at all as a legal obligation; for the debtor reserves to himself the control of the remedies upon it. The agreement to pay is here; but the right to enforce is, by mutual consent, expressly withheld, and thus the obligation is merely a moral one.

To say that the law will, in such a case, adjudge the debtor to have decided that he is able to pay, whenever the court and jury find that he is so, is only a mode of getting clear of the real contract by assuming a fictitious and constructive one. It would still be the imposition of a duty as a contract, contrary to the expressed intention of the parties. The instrument given in evidence does not and cannot prove the issue on which the parties went to trial. This view of the contract renders the other questions raised in the trial immaterial.

Judgment reversed, and judgment for defendant below on the reserved question, *non obstante veredicto*.

In the Supreme Court of Wisconsin.

SAMUEL LUMSDEN AND WILLIAM LUMSDEN, APPELLANTS *vs.* THE CITY OF MILWAUKEE, APPELLEE.

By the 11th art. of the Constitution of Wisconsin, it is provided that "no municipal corporation shall take private property for public uses, against the consent of the owner, without the necessity thereof being first established by the verdict of a jury." The charter of the city of Milwaukee authorized the judge of the Circuit or County Court of Milwaukee, where land is proposed to be taken for public use, to

appoint twelve jurors to view the ground, determine the necessity of the taking, and assess the damages therefor; but the Act did not in express terms require that the jury should be sworn before entering upon their duties, or provide any mode for swearing them: Held that the act was unconstitutional, and the proceedings thereunder void, though the jury may have been in fact sworn.

Nelson Cross, of counsel for appellants.
H. L. Palmer and *E. Foote*, of counsel for appellee.

The opinion of the court was delivered by

COLE, J.—In disposing of this appeal, it does not become necessary to consider and determine whether or not all the provisions of the charter of the city of Milwaukee, which relate to the manner of appointing a jury to view the premises, and the mode of proceeding prescribed for establishing the necessity of taking the property for public use, fully and substantially comply with the the second section of the eleventh article of the constitution of this State. For the purposes of this case, it may be conceded that the jury may be selected in the manner prescribed in the charter, and that the constitution did not contemplate the making up of an issue in a court of record to try the question as to the necessity of appropriating the land to the use of the public, against the consent of the owner, *and still we think there is a fatal defect in the charter which invalidates the whole proceeding.* We have not been able to find any provision of the charter, which, by any fair, reasonable construction, requires that the jury appointed by the judge *should be sworn* before entering upon the discharge of the duty of viewing the ground and establishing the necessity. That it is absolutely essential to the validity of the proceeding, that the jury, or commissioners if you please to call them such, should act under the solemnities of an oath, in determining the necessity, was not controverted upon the argument of the cause, and probably will not be denied. But it is insisted by the counsel for the appellee, that section twenty, of article six, of the act of 1852, applies to, and requires the jury appointed by the judge, to take the oath. That section reads as follows:

"After the jurors shall have made their report as to the necessity of taking any land under this act, and the same shall have been

confirmed, the Common Council shall have power to appoint new jurors in the place of any who shall neglect or refuse to serve; and the jurors, before entering upon the discharge of their duties, shall severally take an oath before some competent officer, that they are freeholders of said city, and not interested in the premises proposed to be taken, and that they will faithfully and impartially discharge the trust reposed in them."

It is admitted that this is the only provision of the charter which says anything about the jury being sworn, and the question is, can it be construed as referring to the jury appointed by the judge in the first instance? We cannot perceive how such a construction can be maintained. To determine the object and meaning of the twentieth section, let us look at some of the other provisions of the charter.

The act of 1852, with the amendments contained in the act of 1856, authorizes the judge of the Circuit or County Court of Milwaukee county, upon proper application, to appoint twelve jurors to view the ground proposed to be taken for public use, and determine whether it is necessary thus to take it. Other provisions of the two acts prescribe the manner in which the jury shall proceed to view the premises, for the taking of such testimony as may be offered by parties interested, and for their making a report to the Common Council, within a certain time, of their proceedings, in which report the jury is required to state whether, in their judgment, it is necessary to take the premises in question. It is still further provided by other sections, that the same jury may make an assessment of the amount of the damages to be paid to the owner for the property proposed to be taken. It is proper to observe that if any of the jurors appointed by the judge to view the premises are disqualified from acting or refuse to act, the judge is authorized to appoint others in their stead. Then in natural order comes the twentieth section, which provides that, after the jurors shall have made their report as to the necessity of taking any lands under the act, and the report has been confirmed, the Common Council shall have power to appoint new jurors in the place of any who shall neglect or refuse to serve in determining the amount of damages to

be paid to the owner of the property, and those jurors are required to take an oath.

It appears to us that the natural connection and relation of the words in the context show that the jurors spoken of in this section were the new ones who might be appointed by the Common Council, and not the ones appointed by the judge. *It is essential that the oath should be taken by the first jury, and the charter in clear and unambiguous language should require it to be done.* It is very probable that it is a *casus omissus* in the law, but we cannot supply it by construction. We do not think that the charter, as it now stands, does provide that the first jury should be sworn. It is true it is set up in the answer, that the jury appointed to view the premises and determine the necessity of taking them for public use, were sworn before entering upon the discharge of their duties, but it is very manifest that if the oath was not required by the charter, it was extra-judicial, and no indictment for perjury would lie upon it, however clearly it might be proven that the jury, in their finding and report, had acted most partially and corruptly. *If the first jury was not required by the charter to be sworn, they could not determine the necessity of taking the property, within the spirit and meaning of the constitution. Consequently the corporation derived no right under the proceeding, to invade the land of the complainants, and make a permanent appropriation thereof, for the use of the public.*

We deem it proper to make one or two observations further upon this section. It must be obvious, that a proceeding under this charter to condemn and set apart property belonging to an individual, for the use of the public, is an adversary proceeding, wherein the municipal corporation of the city of Milwaukee, representing the public, is a party on the one side, and the person whose property it is proposed to take, is a party on the other side. By the twentieth section, it will be seen, power is given to the Common Council to appoint jurors (in the place of any who may neglect or refuse to serve of those first appointed by the judge) whose duty it is to determine the amount of damages to be paid to the owner of the land. A majority, or even all of the jurors selected to establish

the necessity of taking the property, may refuse to act in fixing the amount of damages; in which case the Common Council, one of the parties, *ex parte*, may appoint a jury which shall determine the amount of damage the city must pay. *It is impossible to comment in a proper manner upon such a provision which confounds all our notions of fairness, justice and right.* Nor does it improve the character of the provision to find that the award of the jury thus selected must be confirmed by a resolution of the Board of Common Council before it is binding, and that the action of the Board is conclusive and final upon the rights of the parties interested therein, and from which there is no appeal. [Sec. 14, chap. 6, Act, 1852; Sec. 5, Act 1856.]

If, therefore, the corporation of the city of Milwaukee had no right to enter upon the land of the complainants, not having taken those steps which it was indispensable should be taken to determine and establish the necessity of taking it for public use; if it was about to appropriate the land permanently to the use of the public; we think it very proper that a court of equity should interfere by injunction and restrain the trespass. It seems to be well settled that courts of equity will thus interfere in such cases. See *Bonaparte* vs. *The Camden and Amboy R. R. Co.*, 1 Bald. C. R. 206; *Mohawk and Hudson R. R. Co.* vs. *Artcher*, 6 Paige, 83; 2d Story's Eq. Jur. § 927, et seq., and cases cited in the notes.

It follows, therefore, that the order of the Circuit Court dissolving the injunction must be reversed, and the cause remanded for further proceedings according to law.